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5 **CITY OF SEATTLE**  
6 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**

7 IN RE THE APPEAL OF:

8 B.T. ROBERT MAHONEY,

9 Appellant,

10 vs.

11 CITY OF SEATTLE, SEATTLE  
12 POLICE DEPARTMENT,

13 Respondent/Employer.

No. 09-001

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

14  
15 **I. INTRODUCTION**

16 The Commission heard this matter pursuant to a Notice of Appeal filed by Officer  
17 Bernard T. Robert Mahoney appealing disciplinary action imposed by the Seattle Police  
18 Department (Department). Chief Kerlikowske suspended Officer Mahoney for 30 days and  
19 transferred him out of the Training Unit of the Department.

20 The Commission held a full evidentiary hearing on May 1, 4, and 5, 2009, before  
21 Commissioners Joel Nark, Herb Johnson and Terry Carroll, with Commissioner Nark acting as  
22 Presiding Officer. The parties submitted briefs on May 29, 2009, which is therefore the date the  
23 Commission record closed. The Commission has jurisdiction over this matter pursuant to Article  
XVI, Section 3 of the Seattle City Charter and Chapter 4.08 of the Seattle Municipal Code. The  
Commission may affirm, reverse or modify the department's decision. SMC 4.08.100.

1 The standard of review is found in SMC 4.08.100 and Commission Rule 6.21. The  
2 Department has the burden of showing by a preponderance of evidence that the discipline was  
3 "in good faith for cause." The Commission has the authority to affirm, reverse, or modify the  
4 decision of the employing department pursuant to SMC 4.08.100.A.

5 The Commission has utilized several factors in analyzing whether the Department has  
6 met its burden. The factors are not exclusive - nor are they elements that each must be proven.  
7 As the Commission has repeatedly said in prior decisions, the factors are just that - factors it  
8 considers in its analysis.

9 The factors include whether: (1) the employee had notice that his or her conduct would  
10 result in disciplinary consequences; (2) the rule was reasonable; (3) the employer investigated to  
11 determine whether the rule was in fact violated; (4) the investigation was fair; (5) the employer's  
12 decision-maker had substantial evidence that the employee violated the rule as charged; (6) the  
13 employer applies its rules even-handedly; and (7) the discipline administered was fair in relation  
to the nature of the offense and imposed with regard to the employee's past work record.<sup>1</sup>

14 The Commission analyzes each of the two charges in light of the factors to determine  
15 whether the Department had just cause to impose the disciplinary action. After considering the  
16 evidence in this case, including testimony, documentary evidence, and arguments of the parties  
and their representatives, the Commission entered Findings of Fact, Conclusions of Law and  
Order, as provided in SMC 4.08.100.<sup>2</sup>

17 The Department and Officer Mahoney each moved for reconsideration of the  
18 Commission's decision. The Commission considered those motions and enters these Amended  
19 Findings of Fact, Conclusions of Law, and Order, which replace the original Findings of Fact,  
20 Conclusions of Law, and Order dated July 29, 2009.

## 21 **II. FINDINGS OF FACT**

22 <sup>1</sup> See PSCSC #07-005 Marcia Kinder v. SFD; PSCSC #06-006 Richard Roberson v. SPD; and PSCSC # 07-007  
23 Felton J. Miles III v. SPD

<sup>2</sup> Unless noted otherwise, individual findings of fact and conclusions of law are unanimously adopted by the  
Commission.

1           1.     The Appellant, Officer B.T. Robert Mahoney, has been employed as a Seattle  
2 Police Officer for 10 years. At the time of his suspension, Officer Mahoney was assigned to the  
3 Department's Training Unit.

4           2.     Prior to the suspension, Officer Mahoney had no disciplinary record during his 10  
5 years of service.

6           3.     In 2007, Officer Mahoney became acquainted with Heather Newstrom, a senior at  
7 Holy Names Academy. She was a leader in the Department's Explorer program and was often at  
8 the Department's training facility.

9           4.     On April 7, 2008, Ms. Newstrom reported that Officer Mahoney kissed her on the  
10 lips earlier that evening after all the other SPD employees left the training unit, and that the kiss  
11 was both uninvited and unwelcome. She reported the details of the incident to Explorer Advisor  
12 Azrielle Johnson, who documented Ms. Newstrom's complaint and drafted a memo to Assistant  
13 Chief Nick Metz.

14           5.     On April 10, 2008, the Department's Office of Professional Accountability (OPA)  
15 began investigating the allegation.

16           6.     The Department concluded that Ms. Newstrom was credible and charged Officer  
17 Mahoney with misconduct. SPD later added the dishonesty charge based on official statements  
18 Officer Mahoney made during the OPA investigation. Chief Kerlikowske reviewed the  
19 investigation and imposed a 30-day suspension and a disciplinary transfer.

20           7.     In the hearing before the Commission, Officer Mahoney denied the allegations  
21 and further alleged the OPA investigation was biased against him.

### 22                               **III. CONCLUSIONS OF LAW**

#### 23           **The Misconduct Charge – Inappropriate Contact with Ms. Newstrom**

          8.     Notice – Officers are responsible for knowing the Department manual. Officer  
Mahoney had proper notice and knowledge that inappropriate contact with an Explorer would  
result in disciplinary action against him and that an uninvited and unwelcome kiss was an  
inappropriate contact.

          9.     Reasonableness of Rule – Officer Mahoney was in a position of trust in the  
Training Unit and relative to the Explorer program. A prohibition against inappropriate contact  
(such as an uninvited and unwelcome kiss) with program Explorers is eminently reasonable.

1           10.   Fairness of Investigation – The OPA conducted an investigation which included  
2 interviews with Officer Mahoney, Ms. Newstrom and others associated with the Explorer  
3 Program, the Training Unit and the Department. The Commission majority concludes that  
4 Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against  
5 him in the Department and the investigation the Department conducted in this case. The  
6 Commission majority also concludes there is no substantial evidence to support Officer  
7 Mahoney’s claim that the investigation of the misconduct charge was either improperly

8           11.   Chief had Substantial Evidence – The Commission unanimously concludes that  
9 Chief Kerlikowske had substantial evidence that Officer Mahoney had inappropriate contact with  
10 Ms. Newstrom. The Chief found Ms. Newstrom’s allegation to be credible regarding this  
11 incident. Officer Mahoney and Ms. Newstrom told diametrically opposing stories. Based on the  
12 investigation and reports, the Chief of Police found there was substantial evidence to support Ms.  
13 Newstrom’s version of events and to conclude that Officer Mahoney had engaged in misconduct  
14 by subjecting her to an uninvited and unwelcome kiss. The Commission also heard testimony  
15 from Ms. Newstrom and Officer Mahoney and concludes that the Chief of Police had ample  
16 evidence to believe Ms. Newstrom’s version of the events, based on her immediate and later  
17 consistently similar descriptions of the incident and her complete lack of any demonstrated  
18 motivation to falsely make such an allegation.

19           12.   Evenhandedness of Discipline –The Commission unanimously concludes that  
20 Officer Mahoney did not introduce evidence to support a nexus between the alleged bias against  
21 him in the Department and the disciplinary decision the Chief of Police made regarding the  
22 misconduct. The Commission majority also concludes that Officer Mahoney did not introduce  
23 any substantial evidence to support his claim that the misconduct discipline was imposed in an  
inconsistent or unfair manner.

          13.   Proportionality – The Commission majority concludes that a 30-day suspension  
and disciplinary transfer was fair because of the serious nature of the misconduct. Although  
Officer Mahoney had a good record previous to this incident, he was in a special position trust.  
His mentoring role with Ms. Newstrom and his authoritative role in the program made her

1 especially vulnerable to his misconduct. The Commission majority also concludes that Officer  
2 Mahoney did not introduce any substantial evidence to support his claim that the degree of  
3 discipline for misconduct was disproportional in light of his record and the discipline imposed in  
other cases.

4 14. The Commission unanimously concludes that the Department had just cause to  
5 discipline Officer Mahoney by transferring and suspending him for misconduct. The  
6 Commission majority also concludes that the Department had met its burden of showing it had  
just cause to impose a suspension of 30 days for the misconduct.

7 **The Dishonesty Charge – Lying in the OPA Investigation**

8 15. However, a unanimous Commission has concerns about the application of a  
dishonesty charge in this case.

9 16. Notice. First, the Commission unanimously concludes that the Department may  
10 discipline employees for dishonesty. The SPD manual has for the entire time applicable in this  
11 case prohibited dishonesty and therefore put officers on notice that dishonesty may result in  
discipline.<sup>3</sup>

12 17. Reasonableness. A rule against dishonesty is also reasonable. The credibility of  
13 the Department depends upon the honesty of individual officers, particularly in an OPA  
14 investigation.

15 18. Fairness of Investigation. – However, the Commission is concerned about the  
16 application of the dishonesty charges under these circumstances. The dishonesty charge was  
17 added during the pendency of the OPA investigation based solely on Officer Mahoney's  
statements to the investigators.

18 19. Evenhandedness of Discipline – The Commission is unanimously concerned that  
19 the Department has not charged dishonesty in a consistent manner. Rather, the evidence shows  
20 that Department did not charge dishonesty in other misconduct cases in which the Chief resolved  
credibility differences against the officer and in favor of another witness.

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21 <sup>3</sup> A new version of the applicable collective bargaining agreement (CBA) was adopted during the pendency  
22 of the OPA investigation of this case. It included new language regarding terminations in dishonesty cases and the  
23 level of proof required in such cases. The parties disagree about the importance of those changes to this appeal. The  
Commission does not have authority to construe ambiguity in a CBA, but also concludes that it need not construe  
the CBA, since by its plain language it applies to termination cases. This is a suspension and transfer case – not a  
termination case.

20. The potential exists for inconsistent application of a dishonestly charge. The preponderance of the evidence in this case showed that Department has not applied the charge consistently. The Commission unanimously concludes that the Department did not in this particular case have just cause to discipline Officer Mahoney for dishonesty.

#### IV. DECISION

1. The Commission unanimously concludes that the Department met its burden of proving that it transferred Officer Mahoney out of the Training Unit in good faith for cause based upon his misconduct toward Ms. Newstrom.

2. The Commission majority also concludes that the Department met its burden of proving that it suspended Officer Mahoney for 30 days in good faith for cause based upon his misconduct toward Ms. Newstrom.

3. The Commission unanimously concludes that the preponderance of the evidence shows that the Department did not discipline Officer Mahoney for dishonesty in good faith for cause.

#### V. ORDER

1. The Commission affirms the Department's disciplinary transfer and 30-day suspension of Officer Mahoney for misconduct.

2. The Commission dismisses the charge of dishonesty.

Dated this \_\_\_\_ day of August, 2009.

#### PUBLIC SAFETY CIVIL SERVICE COMMISSION OF THE CITY OF SEATTLE

Herb V. Johnson (by get)  
Commissioner Herbert V. Johnson

8/26/09  
Date

Terry Carroll (by get)  
Commissioner Terry Carroll

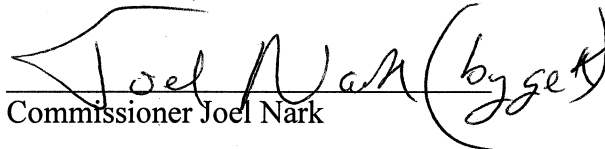
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**PARTIAL DISSENT**

I agree with the Commission majority that the Department has shown that Officer Mahoney engaged in serious misconduct. I also agree that the Department had just cause to transfer Officer Mahoney from the Training Unit, and to suspend him for that misconduct.

I also agree with the Commission majority that the circumstances surrounding the dishonesty charge are troubling. I am concerned that every case of conflicting statements that the Chief of Police resolves in favor of another witness, whether SPD or civilian, not become a separate dishonesty charge.

I do not agree, however, that the Department had just cause to suspend Officer Mahoney for 30 days for this offense. Given his good record before this incident, I would find that the Department had just cause to suspend him for no more than 15 days for this incident of misconduct which, although serious, does not in my opinion justify a 30 day suspension.

 8/26/09  
Commissioner Joel Nark Date